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Civil Contempt and Congressional Interference in the Case of Morgan v. Foretich

Randal S. White

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I. Introduction

Dr. Elizabeth Morgan spent twenty-five months in the District of Columbia Detention Center after superior court Judge Herbert Dixon found Morgan to be in civil contempt for refusing to comply with a court ordered visitation schedule.[1] The visitation schedule called for Morgan's daughter Hilary, then five years old, to have unsupervised visits with her natural father, Dr. Eric Foretich, whom Morgan claims sexually abused the child.[2] Foretich steadfastly denied the charges.[3] Instead of turning the child over to Foretich, Morgan sent Hilary into hiding.[4] Morgan was freed in September, 1989 only after unusual intervention by Congress.[5]

Amassing thousands of pages of testimony, requiring scores of witnesses, and accumulating costs in the millions of dollars, the acrimonious and bitter case of *Morgan v. Foretich*[6] became the largest and most expensive judicial proceeding ever brought in the District of Columbia court system.[7] More significantly, the *Morgan* case

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1. Washington Post, Sept. 24, 1989, at D1, col. 1.

2. Boston Globe, July 16, 1989, (Magazine), at 16, col. 2.

3. *Id.* Foretich acknowledges that the child has been sexually abused but claims that Morgan is the abuser.

4. Morgan convinced her estranged, elderly parents to reunite and flee with the child. Foretich hired private investigators who, in February 1990, located Hilary in Christchurch, New Zealand. N.Y. Times, March 27, 1990, at A20, col. 1. In November 1990, a New Zealand judge awarded custody to Morgan, provided that Morgan remain with her daughter in New Zealand. N.Y. Times, Dec. 1, 1990, at A10, col. 1. Foretich has indicated that he will not pursue the case further. *Id.* For an in-depth account of how the case of Morgan v. Foretich came into being, and the personalities behind the case, see The Boston Globe, July 16, 1989, (Magazine), at 16, col. 1. *See also* N.Y. Times, May 21, 1989, § 6 (Magazine), at 28, col. 1.

5. *See infra* notes 139-85 and accompanying text.

6. To date, there have been four District of Columbia Court of Appeals decisions: Morgan v. Foretich (Morgan I), 521 A.2d 248 (D.C. 1987); Morgan v. Foretich (Morgan II), 528 A.2d 425 (D.C. 1987); Morgan v. Foretich (Morgan III), 546 A.2d 407 (D.C. 1988), *cert. denied*, 488 U.S. 1007 (1989); Morgan v. Foretich (Morgan IV), 564 A.2d 1 (D.C. 1989).

Morgan also brought an action against Foretich and his elderly parents for damages arising out of the Foretichs' alleged sexual abuse of Hilary. *See* Morgan v. Foretich, 846 F.2d 941 (4th Cir. 1988). Morgan's claim for damages was denied by the jury as was Foretich's counterclaims for defamation and intentional infliction of emotional distress. *Id.* at 942. The Fourth Circuit Court of Appeals reversed and remanded the case holding that the district court abused its discretion by excluding evidence that Hilary's sister had been abused by Foretich and excluding out of court statements made by Hilary. *Id.*

7. Boston Globe, July 16, 1989, (Magazine), at 28,

brought the topic of civil contempt and calls for its reform to the forefront of the national media, the courts, and Congress.

In the most general sense, civil contempt is a coercive measure, designed to force a recalcitrant party to comply with a court order.[8] In contrast, criminal contempt is designed to punish a party for not complying with a court order.[9] The distinction between the two is important: if a party is being punished for criminal contempt, then the constitutional safeguards of a criminal trial apply.[10] The same does not hold true for civil contempt proceedings.[11] At some point, however, an imprisoned civil contemnor may be able to show that there is no substantial likelihood that continued confinement will accomplish its coercive purpose, and hence, that confinement has become unconstitutionally punitive.[12] In such a situation, the civil contemnor must be released. It is an ironic paradox: the same defiance that put a contumacious party in jail offers the best hope of release. The individual, however, is still subject to prosecution for criminal contempt, and any other applicable criminal violations.[13]

Most people never test the outer limits of confinement under civil contempt, either because they submit to the court's authority or because their case becomes moot.[14] Such was not the case with Dr. Morgan. The procedural history of the case is long and complex and much of the transcript was kept secret under court order.[15] After twenty-three months of confinement, Morgan argued and lost in the trial court, and stressed again on appeal that her continued confinement had lost its coercive effect and became punitive because there was no realistic possibility that further confinement would induce

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col. 3.

8. D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES 93 (1973). *See also infra* notes 35-64 and accompanying text.

9. *See* D. DOBBS, *supra* note 8, at 93. *See also infra* notes 35-64 and accompanying text.

10. *See infra* notes 39-46 and accompanying text.

11. *See infra* note 47 and accompanying text.

12. *In re* Grand Jury Investigation (Braun), 600 F.2d 420, 424-25 (3d Cir. 1979).

13. In addition to the possibility of being prosecuted for criminal contempt, Morgan's role in hiding her daughter may have amounted to a violation of the Parental Kidnapping Prevention Act of 1985, D.C. CODE ANN. §§ 16-1021-1026 (1988 Supp.), or its federal counterpart, 18 U.S.C. § 1073 (1982).

14. Over ninety-nine percent of civil contemnors relent to the court's authority. The National Law Journal, Oct. 30, 1989, at 42, col. 3. In a situation similar to Morgan's, Karen Newsom claimed her ex-husband had abused their daughter. The court, however, ruled against her and awarded custody to the father. Newsome sent the child into hiding and was imprisoned for civil contempt. After a little over a month in jail, Newsome relented and revealed the location of the child. She was then released. Wilkinson, *Witch-Hunting in Hattiesburg*, THE AMERICAN LAWYER, May, 1988, at 105.

15. For a detailed history of the case, see cases cited in note 6, *supra*.

compliance.[16] The Court of Appeals agreed with Morgan and ordered her release.[17] Unfortunately for Dr. Morgan, her release was not forthcoming. The full Court of Appeals immediately vacated the opinion and ordered the case to be scheduled for a rehearing en banc.[18]

Morgan's eventual release from the Detention Center was not the result of judicial action. Instead, Morgan's imprisonment came to an end in September of 1989 when Congress, in a virtually unprecedented move,[19] passed the District of Columbia Civil Contempt Imprisonment Limitation Act of 1989,[20] a law closely tailored to alleviating Morgan's predicament. The Act amended the District of Columbia Code[21] and limited to twelve months the length of time a person can be imprisoned for civil contempt in the District.[22] The law affected only child custody cases[23] and, in order to free Dr. Morgan, was written to apply retroactively.[24] The law enraged many judges who saw it as a direct encroachment on the powers of the judiciary.[25] Just as troubling to many was the fact that passage of the law came at a time when Morgan's case was still pending in the courts — as the law was being debated on Capitol Hill, the en banc Court of Appeals was hearing oral arguments on the fate of Dr. Morgan.

Professor Robert Martineau postulates that problems with civil contempt "ebb and flow" with problems in society.[26] Elizabeth Morgan's situation is certainly not unique.[27] The number of reports of

16. Morgan v. Foretich (Morgan IV), 564 A.2d 1, 1-2 (D.C. 1989). In the trial court, after sixteen months of incarceration, Judge Dixon declared that "coercion had just begun." *Id.* at 9.

17. *Id.* at 2.

18. *Id.* at 1.

19. *See* Washington Post, Sept. 24, 1989, at D1, col. 1.

20. D.C. CODE ANN. § 11-741 (1981 & Supp. 1990).

21. D.C. CODE ANN. §§ 11-944, 11-721 (1981).

22. D.C. CODE ANN. § 11-741 (1981 & Supp. 1990).

23. *Id.*

24. *Id.* The Act was also written in a fashion that made it effective for only eighteen months. *Id.*

25. Speaking anonymously, one judge called the new law "a terrible and dangerous precedent." Another declared that "[t]he judicial branch had concluded that Dr. Morgan should be in custody . . . and the proper progression of that issue was disrupted by a political lobbying campaign and this legislation. As a judge, but even as a citizen who can stand back and look at this thing, I think it is frightening." Washington Post, Sept. 28, 1989, at C1, col. 1.

26. The National Law Journal, Oct. 30, 1989, at 42, col. 2.

27. *See, e.g.*, Schotz v. Oliver, 361 So. 2d 605 (Ala. Civ. App. 1978) (mother imprisoned on contempt charge for not allowing visitation with father); Casbergue v. Casbergue, 335 N.W.2d 16 (Mich. Ct. App. 1983) (similar to Schotz); Marallo v. Marallo, 128 A.D.2d 710, 513 N.Y.S.2d 204 (1987) (mother imprisoned on civil contempt charge for not allowing visita-

alleged sexual abuse in custody cases has grown steadily.[28] Many parents, however, distrust the judicial system because of the difficulty of proving the abuse in court.[29] The courts' use of civil contempt is now being reevaluated in light of the *Morgan* case, with an increasing number of calls for reform.[30]

This Comment will explain how courts have traditionally made a distinction between civil and criminal contempt and the importance of the distinction.[31] Section III narrows the focus and examines how courts have determined when the coercive nature of civil contempt ends and punishment begins.[32] Section IV addresses Congress's approach to the issue, and includes a critical analysis of the District of Columbia Civil Contempt Imprisonment Limitation Act.[33] Finally, section V proposes solutions that strike a balance between the court's ability to enforce its decrees and the rights of civil contemnors, without placing a cap on the time a person may be imprisoned for civil contempt.[34]

II. Civil and Criminal Contempt

The ability to hold someone in contempt is a venerable power, one that has long been considered an inherent power of the judicial branch.[35] The contempt power dates back to the early days of England,[36] and in its earliest form was sometimes used to effectuate bar-

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tion with grandparents); Young v. Young, 129 A.D.2d 794, 514 N.Y.S.2d 785 (1987) (father imprisoned on civil contempt charge for not giving custody of child to mother); People v. Warden, 46 A.D.2d 256, 362 N.Y.S.2d 171 (1974), *aff'd*, 370 N.Y.S.2d 913; King v. Department of Social & Health Serv., 110 Wash. 2d 793, 738 P.2d 1303 (1988) (father imprisoned for contempt in refusing to disclose location of child).

28. According to the American Humane Association, there were 6,000 confirmed reports of child sexual abuse in 1976. By 1986, the number had risen to 132,000. New York Times, May 21, 1989, at 90, col. 2.

In most courts, approximately two percent to ten percent of all family court cases involving custody and/or visitation disputes also involve a charge of sexual abuse. SEXUAL ABUSE ALLEGATIONS IN CUSTODY AND VISITATION CASES 4 (E. Nicholson ed. 1988).

29. All but the most flagrant cases of sexual abuse are difficult to validate. SEXUAL ABUSE ALLEGATIONS IN CUSTODY AND VISITATION CASES, 53-54 (E. Nicholson ed. 1988).

30. The original sponsor of the House Bill amending the District's law on civil contempt, Representative Frank Wolf (R-Va.), expressed an intention to write to the Governors of each state encouraging them to enact similar legislation. 135 CONG. REC. H5843 (daily ed. Sept. 21, 1989) (statement of Rep. Wolf).

31. *See infra* notes 35-64 and accompanying text.

32. *See infra* notes 65-138 and accompanying text.

33. *See infra* notes 186-216 and accompanying text.

34. *See infra* § V.

35. *See Ex parte* Robinson, 19 U.S. 505, 510 (1873); *see also*, Levine v. United States, 362 U.S. 610, 616 (1960) (contempt is a power "absolutely essential" for the functioning of an independent judiciary).

36. R. GOLDFARB, THE CONTEMPT POWER 9 (1963).

baric results.[37] Although the authority to hold someone in contempt has been exercised in the United States since the birth of our judicial system, courts have traditionally had much difficulty distinguishing the two types of contempt.[38] The distinction is important from the viewpoint of the contemnor because the labelling of contempt as civil or criminal determines the amount of due process protections available in any contempt proceedings. An alleged criminal contemnor is entitled to an unbiased judge,[39] a presumption of innocence until found guilty beyond a reasonable doubt,[40] a right against self-incrimination,[41] notice of the charge,[42] time to prepare a defense,[43] and the right to call witnesses.[44] An alleged criminal contemnor also has the right to be represented by effective counsel.[45] To many, one of the most important features of a criminal contempt proceeding is the right to a jury trial if the sentence is to be imprisonment for more than six months.[46] In contrast to the protections afforded an alleged criminal contemnor, due process in a civil contempt hearing merely requires that the party be given notice and a hearing.[47]

The United States Supreme Court addressed the problem of distinguishing between civil and criminal contempt in *Gompers v. Bucks Stove and Range Co.*[48] The *Gompers* Court attempted to establish a definitive test for distinguishing between civil and criminal contempt. This attempt, however, actually created confusion in the lower courts.[49] Nevertheless, courts have frequently used the criteria established in *Gompers* to determine when a contempt is civil or criminal. The Court held that

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37. In 1631 at the Salisbury assizes, a defendant, miffed at the sentence imposed upon him, threw a brickbat at the judge, narrowly missing him. For this, the defendant's hand was cut off and fixed to a gibbet. He was then immediately hanged in the presence of the court. (A "brickbat" is defined as a fragment of a hard material (such as a brick), or an uncomplimentary remark. WEBSTER'S NEW COLLEGIATE DICTIONARY 137 (1st ed. 1973); a "gibbet" is defined as a gallows, or an upright post with a projecting arm for hanging the bodies of executed criminals as a warning. WEBSTER'S NEW COLLEGIATE DICTIONARY 484 (1st ed. 1973)). Dobbs, *Contempt of Court: A Survey*, 56 CORNELL L. REV. 183, 187 (1971).

38. R. GOLDFARB, *supra* note 36, at 31.

39. *In re* Murchison, 349 U.S. 133, 137 (1955).

40. Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 444 (1911).

41. *Id.*

42. *See* FED. R. CRIM. P. 42(b) for requirement that notice and a hearing be given in a criminal contempt case.

43. Cooke v. United States, 267 U.S. 517, 537 (1925).

44. *Id.*

45. *In re* Oliver, 333 U.S. 257, 275 (1948).

46. Bloom v. Illinois, 391 U.S. 194 (1968); Cheff v. Schnackenberg, 384 U.S. 373 (1966).

47. *See* Dobbs, *supra* note 37, at 243.

48. 221 U.S. 418 (1911).

49. *See* R. GOLDFARB, *supra* note 36, at 57.

> [i]t is not the fact of punishment but rather its character and purpose that often serve to distinguish between the two classes of cases. If it is for civil contempt the punishment is remedial and for the benefit of the complainant. But if it is for criminal contempt the sentence is punitive, to vindicate the authority of the court.[50]

Hence, courts have often focused on the *purpose* of the punishment. If a sentence is intended to coerce a recalcitrant party to comply with a court order, it is remedial and therefore a civil contempt. If the sentence is intended to punish a party for not complying with a court order, the contempt is criminal.

Half a century after *Gompers*, the Supreme Court stated the test in the form of a question: "what does the court primarily seek to accomplish by imposing sentence?"[51] Unfortunately, as pointed out in *Gompers*, a problem with formulating a test around the purpose of the punishment is that in most cases, the sentence imposed has incidental effects.[52] For example, if the court imprisons a contumacious party in order to force compliance with its order, the court also vindicates its authority.[53] If a sentence is for purposes of criminal punishment, the complainant may also receive some benefit from the fact that the punishment may prevent a repetition of the disobedience.[54]

The *Gompers* Court identified an additional factor to be taken into account for purposes of distinguishing between civil and criminal contempt: who initiated the proceeding.[55] Proceedings for civil contempt are between the original parties, whereas criminal contempt proceedings are between the public and the alleged contemnor, and usually initiated by a prosecutor.[56]

The *Gompers* Court recognized still another distinguishing feature between the two types of contempt. The Court stated:

> The distinction between refusing to do an act commanded, — remedied by imprisonment until the party performs the required

50. *Gompers*, 221 U.S. at 441.
51. Shillitani v. United States, 384 U.S. 364, 370 (1966).
52. *Gompers*, 221 U.S. at 443.
53. Gompers v. Bucks Stove and Range Co., 221 U.S. 418, 443 (1911). Goldfarb postulates that in all cases, the primary purpose behind the contempt power is to assert power by government over interfering individuals. Even in civil contempt cases, "there is an exaltation of government and a strengthening of its control and power through the judicial process." R. GOLDFARB, *supra* note 36, at 57.
54. *Gompers*, 221 U.S. at 443.
55. *Id.* at 444-45.
56. *Id. See also* United States v. Russoti, 446 F.2d 945, 949 (2d Cir. 1984) (civil contempt initiated by a party to the underlying proceeding).

> act; and doing an act forbidden, — punished by imprisonment for a definite term; is sound in principle, and generally, if not universally, affords a test by which to determine the character of the punishment.[57]

This concept, related to the purpose test, focuses on the type of sentence imposed. In this sense, criminal contempt is characterized by a fixed, or determinate sentence, whereas civil contempt is characterized by an open, or indefinite sentence compelling the civil contemnor to be imprisoned until the court order is obeyed.

The Supreme Court, in *Hicks v. Feiock*,[58] decisively adopted the objective test hinted at in *Gompers* to distinguish between civil and criminal contempt. Retreating from the "purpose of the punishment" test, the majority reasoned that "this Court has never undertaken to psychoanalyze the subjective intent of a State's laws and its courts, not only because that effort would be unseemly and improper, but also because it would be misguided."[59] Instead, the proper way to analyze the issue is to simply examine the sentence imposed.[60] If the sentence is determinate (such as one year imprisonment), the contempt is classified as criminal.[61] But if the sentence is indeterminate, thereby holding the party in contempt until compliance, the contempt is civil.[62]

An objective test is well suited for appellate courts because the sentence is examined retrospectively. This type of test, however, can also be easily applied at the trial level by simply requiring the trial judge to determine beforehand what type of sentence is to be imposed and then to follow the applicable procedures.[63] It seems that the Supreme Court has wisely adopted Professor Dobbs's proposal of nearly two decades earlier that "[i]t is enough to say that a determinate ('criminal') sentence cannot be meted out where criminal-type protections are not afforded in the procedure. It is not necessary to

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57. *Gompers*, 221 U.S. at 443.

58. 485 U.S. 624 (1988).

59. *Id.* at 633. The court seems to be somewhat ignorant of its prior decisions that have in fact looked to the subjective intent of lower courts, in other words, the purpose of the sentence. *See, e.g.*, Shillitani v. United States, 384 U.S. 364 (1966) (the character and purpose of the punishment is a factor in distinguishing between civil and criminal contempt); Gompers v. Bucks Stove & Range Co., 221 U.S. 418 (1911) (same).

60. *Feiock*, 485 U.S. at 633.

61. *Id.*

62. *Id.*

63. *See* Note, *Modern Discussion of a Venerable Power: Civil Versus Criminal Contempt and Its Role in Child Support Enforcement:* Hicks v. Feiock, 22 CREIGHTON L. REV. 163, 188 (1988).

say more."[64]

III. When Coercion Ends and Punishment Begins

Courts have rationalized their ability to hold civil contemnors in jail for extended periods without the due process protections accorded criminal contemnors by relying on the legal cliche that civil contemnors "carry the keys of their prison in their own pockets."[65] Thus, civil contemnors have the ability to control their release by simply complying with the court order. It follows logically that because it is impossible to coerce someone to do something beyond their power to perform, a civil contemnor must be released if he no longer has the ability to comply with the court's mandate.[66]

A problem arises if an individual, such as Dr. Morgan, has the ability to comply, but because of steadfast moral, religious, or ethical principles, adamantly refuses to comply. In such a case it may be likely that no amount of coercion will force that person to relent. It is clear that a civil contempt incarceration cannot last forever, thereby becoming a de facto sentence of life imprisonment.[67] The task of determining exactly how long a civil contemnor may be incarcerated, however, is all too often a perplexing one at best.[68] Given the notion that civil contempt is remedial and coercive,[69] the legal justification for incarceration ends when it becomes clear that the incarceration has lost its coercive power. When it is clear that civil contempt sanctions are fruitless, they lose their remedial characteristics and become more punitive. The contemnor must then be released because of the notion that criminal penalties may not be imposed in civil contempt proceedings.[70] This was precisely the issue raised by Dr. Morgan in *Morgan IV*.[71] Morgan argued that contin-

64. Dobbs, *supra* note 37, at 246.

65. *In re* Nevitt, 117 F. 448, 461 (8th Cir. 1902). Professor Goldfarb criticizes this oft repeated expression as having a "clear absence of realism" because incarcerating a person until an order is complied with is as much a punishment for refusing to do an act as it is a coercion to perform it in the future. R. GOLDFARB, *supra* note 36, at 59-60.

66. Maggio v. Zeitz, 333 U.S. 56, 76 (1948). *See also* Shillitani v. United States, 384 U.S. 364 (1966) (when grand jury has been discharged, the rationale for holding a recalcitrant witness has ended and the witness must be released).

67. *See* Simkin v. United States, 715 F.2d 34, 37 (2d Cir. 1983); *In re* Thornton, 560 F. Supp. 183 (S.D.N.Y. 1983); King v. Department of Social & Health Serv., 110 Wash. 2d 793, 738 P.2d 1303 (1988). *See also* Catena v. Seidl, 65 N.J. 256, 259, 321 A.2d 225, 228 (1974) ("It is abhorant to our concept of personal freedom that the process of civil contempt can be used to jail a person indefinitely, possibly for life, even though he or she refuses to comply with a court's order.").

68. *See infra* notes 88-114 and accompanying text.

69. *See supra* note 50 and accompanying text.

70. *In re* Grand Jury Investigation (Braun), 600 F.2d 420 (3d Cir. 1979).

71. 564 A.2d 1 (D.C. 1989).

ued confinement violated her right to due process because it had become clear that further incarceration would not coerce her into revealing the whereabouts of her child. She claimed, therefore, that the character of her contempt conviction changed from remedial to punitive.[72]

The fairly recent practice of courts to review civil contempt orders to determine whether incarceration has lost its coercive effect has primarily been in the context of recalcitrant witnesses who refuse to testify before a grand jury.[73] The principle has, however, been applied to other cases that resemble the situation faced by Dr. Morgan.[74]

A. Due Process Concerns

In concluding that a civil contemnor must be released when confinement has lost its coercive force, some courts have addressed the problem without considering potential constitutional issues.[75] Some courts have considered possible eighth amendment problems of cruel and unusual punishment.[76] Most courts, however, base their decision on due process concerns.[77]

Those courts raising due process concerns reason that when confinement has lost it coercive force and consequently no longer bears a reasonable relationship to the purpose for which the contemnor was imprisoned, due process requires that person's release.[78] This concept is based on the United States Supreme Court's holding in *Jackson v. Indiana*.[79] In *Jackson*, the defendant in a robbery trial lacked sufficient comprehension to stand trial and was committed to a mental

72. *Id.* at 1-2.

73. *See, e.g., In re* Parrish, 782 F.2d 325 (2d Cir. 1986); *In re* Dickinson, 763 F.2d 84 (2d Cir. 1985); United States *ex rel.* Thom v. Jenkins, 760 F.2d 736 (7th Cir. 1985); *In re* Crededio, 759 F.2d 589 (7th Cir. 1985); Sanchez v. United States, 725 F.2d 29 (2d Cir. 1984); Simkin v. United States, 715 F.2d 34 (2d Cir. 1983); *In re* Grand Jury Investigation (Braun), 600 F.2d 420 (3rd Cir. 1979); *In re* Papadakis, 613 F. Supp. 109 (D.C. Ill. 1985); *In re* Thornton, 560 F. Supp. 179 (S.D. N.Y. 1983); *In re* Dohrn, 560 F. Supp. 179 (S.D. N.Y. 1983); United States v. Dien, 598 F.2d 743 (2d Cir. 1979).

74. *See, e.g.* King v. Department of Social & Health Serv., 110 Wash. 2d 793, 756 P.2d 1303 (1988) (father imprisoned for not revealing whereabouts of child.)

75. *Id. See also* Catena v. Seidl (Catena I), 65 N.J. 756, 321 A.2d 225 (1974); Catena v. Seidl (Catena II), 68 N.J. 224, 343 A.2d 744 (1975).

76. *In re* Farr, 36 Cal. App. 3d 577, 111 Cal. Rptr. 649 (1974).

77. Simkin v. United States, 715 F.2d 34 (2d Cir. 1983); *In re* Grand Jury Investigation (Braun), 600 F.2d 420 (3d Cir. 1979); Lambert v. Montana, 545 F.2d 87 (9th Cir. 1976); *In re* Dohrn, 560 F. Supp. 179 (S.D.N.Y. 1983); Morgan v. Foretich (Morgan IV), 564 A.2d 1 (D.C. 1989).

78. *See, e.g., Grand Jury Investigation (Braun)*, 600 F.2d at 424-25; *Lambert* 545 F.2d at 89-90.

79. 406 U.S. 715 (1972).

institution until the Department of Mental Health deemed him sane.[80] A court appointed doctor testified that Jackson might never be competent because he lacked sufficient intelligence to develop communication skills.[81] Defense counsel argued that Jackson's commitment amounted to a life sentence without ever being convicted of a crime.[82] The Supreme Court agreed, holding that "[a]t the least, due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed."[83]

Although the due process test is easily formulated, the point at which imprisonment actually ceases to be coercive is not readily discernable.[84] Judge Posner once stated:

> We should keep a bright line between civil and criminal contempt. Putting a person in prison for up to eighteen months [the maximum period of incarceration on civil contempt for witnesses refusing to testify before a federal grand jury[85]] . . . without a full trial, and with none of the safeguards of the criminal process . . . is an anomaly in our system . . . .[86]

Although such a bright line is certainly desirable to protect the due process rights of civil contemnors, it is unfortunately an impossible task to formulate one. To determine when coercion ends, courts utilize the "substantial likelihood" test. Under this test, the contemnor must be released if there is no substantial likelihood that continued confinement will accomplish its coercive purpose.[87] The nature of the test reveals that it is difficult to apply and especially daunting for the trial court judge who must necessarily make a prediction into the future on the effects of further incarceration on each individual contemnor. The judge is faced with the unenvious task of having to look into the future to gauge, not what *will* happen, but the *prospect* that something will happen.[88] The task becomes even more difficult for appellate court judges who are not in the position to observe the con-

80. *Id.* at 719.
81. *Id.*
82. *Id.*
83. *Id.* at 738.
84. *See In re* Grand Jury Investigation (Braun), 600 F.2d 420, 425 (3d Cir. 1979).
85. *See infra* note 122 and accompanying text.
86. *In re* Crededio, 759 F.2d 589, 594 (7th Cir. 1985) (Posner, J., dissenting).
87. Morgan v. Foretich (Morgan IV), 564 A.2d 1, 12 (D.C. 1989); Lambert v. Montana, 545 F.2d 87, 87 (9th Cir. 1976); *In re* Farr, 36 Cal. App. 3d 577, 577, 111 Cal. Rptr. 649, 649 (1974). Some courts have stated the test as being whether a civil contempt sanction has lost any "realistic possibility" of having a coercive effect. Simkin v. United States, 715 F.2d at 34, 37 (2d Cir. 1983). The difference is semantic only.
88. *In re* Parrish, 782 F.2d at 325, 327 (2d Cir. 1986).

temnor testify.

B. Time

The mere passage of time clearly does not transform coercion into punishment.[89] In *King v. Department of Social and Health Services*,[90] Sarah King filed a complaint with Child Protective Services alleging that her husband had violently abused their two young children, J. and L.[91] Mrs. King later recanted the allegation, which was made when she was in the psychiatric ward of a hospital.[92] The circumstance giving rise to the allegation was the death of L., who had allegedly been trapped between a mattress and a wall.[93] As a result of Mrs. King's allegation, both parents were ordered to bring J. to a dependency hearing.[94] The Kings refused, and as a result, both were imprisoned on civil contempt charges.[95] Mrs. King, however, was released shortly after her confinement because she did not know where J. was located.[96] After eleven months of imprisonment, Mr. King still refused to reveal the location of the child. The Washington Court of Appeals held that the court's attempt to coerce King to disclose the location of the child had become secondary to the punitive nature of the contempt.[97] The court concluded that as a matter of law, Mr. King's confinement had become punitive.[98] The Washington Supreme Court reversed, holding that the mere passage of time does not transform coercive contempt into punitive contempt.[99] Instead, the issue must be addressed on a case by case basis "after a conscientious consideration of the circumstances pertinent to the *individual* contemnor . . . ."[100]

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89. King v. Department of Social & Health Serv., 110 Wash. 2d 793, 794, 756 P.2d 1303, 1309 (1988).

90. 47 Wash. App. 816, 738 P.2d 289 (1987), *rev'd*, 110 Wash. 2d 793, 756 P.2d 1303 (1988).

91. *Id.* at 818, 738 P.2d at 290.

92. *Id.*

93. *Id.*

94. *Id.* at 819, 738 P.2d 289, 290-91.

95. King v. Department of Social & Health Serv., 47 Wash. App. 816, 820, 738 P.2d 289, 290-91 (1987).

96. *Id.* at 820, 738 P.2d at 291.

97. *Id.* at 826, 738 P.2d at 294.

98. *Id.*

99. King v. Department of Social & Health Serv., 100 Wash. 2d 793, 799, 756 P.2d 1303, 1309 (1988).

100. *Id.* at 799, 756 P.2d at 1309-10 (quoting Simkin v. United States, 715 F.2d 34 (2d Cir. 1983)) (emphasis added). In *Simkin*, the court reversed the district judge's ruling that Simkin's incarceration had become punitive because the judge did not make an individualized assessment. The district judge discounted Simkin's testimony that he would never comply and stated, "It is not his case that I am worried about. He is only one case. It is another hundred

C. *Factors Considered by Judges*

Judges consider various factors when they hear motions for the release of civil contemnors. The testimony of the individual imprisoned for contempt is the most basic and obvious factor. Of course, a judge need not accept as conclusive a contemnor's avowed intention never to testify.[101] The purpose of civil contempt would obviously be eviscerated if all contemnors could gain release by simply stating they will never comply. Even if a contemnor had an honestly held belief that he or she would not comply, that attitude might be altered by continued confinement.[102] Although a judge need not accept such testimony, that does not mean that it may not be considered; a contemnor does not have to present any more evidence than his or her own testimony.[103] Indeed, many times that is all the judge may have to consider.[104]

Judges also consider the contemnor's age and state of health, as well as the length of confinement.[105] Some members of the bench have turned the argument around and reason that age and health do not necessarily detract from, but instead may actually increase, the coercive effect of imprisonment.[106] As age increases and health deteriorates, the desire to be free may become stronger.

The court in *King* held that one factor to be considered in deciding whether a civil contemnor should be released is the significance of the ends to be achieved.[107] Courts could then balance their interests in enforcing compliance with a particular order against the contemnor's liberty.[108] In *King*, this factor militated against King's re-

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cases I may get on civil contempt . . . ." *Simkin*, 715 F.2d at 39. Thus, a judge should not take into account any possible problems in the future with civil contempt cases, but instead must look at the particular facts of each case. *Cf. In re* Crededio, 759 F.2d 585, 592 (7th Cir. 1985) (district court's concern that releasing Crededio would undermine the civil contempt sanction is a valid factor that may be considered).

101. Morgan v. Foretich (Morgan IV), 564 A.2d 1, 5 (D.C. 1989); *Simkin* 715 F.2d at 37; *In re* Dohrn, 560 F. Supp. 179, 180 (S.D. N.Y. 1983).

102. *See In re* Parrish, 782 F.2d 325, 328 (2d Cir. 1986). *See also supra* note 14.

103. Sanchez v. United States, 725 F.2d 29, 31 (2d Cir. 1984). Of course, from a practical standpoint it would be helpful to present other witnesses whose testimony the hearing judge could consider. For instance, in one of Dr. Morgan's hearings before Judge Dixon, Morgan presented statements from Hilary and opinions of lay persons and professionals who had contact with Hilary to show Morgan's undying belief that Hilary was sexually abused, and that Morgan would never hand the child over to Foretich. Morgan's priest, her psychiatrist, and her fiancee (now husband), The Honorable Paul Michel, all testified about Morgan's resolution to stay in jail as long as she believed necessary to protect the child. *Morgan IV*, 564 A.2d at 3.

104. *Sanchez*, 725 F.2d at 31.

105. Catena v. Seidl (Catena II), 68 N.J. 224, 227, 343 A.2d 744, 747 (1975).

106. *Id.* at 230, 343 A.2d at 750-51 (Schreiber, J., dissenting).

107. King v. Department of Social & Health Serv., 110 Wash. 793, 800, 756 P.2d 1303, 1310 (1988).

108. *Id.*

lease because the court reasoned that the physical safety and well-being of the missing child might be endangered by King's continued defiance in not divulging the location of the child.[109] The District of Columbia Court of Appeals in *Morgan IV* was critical of the use of such a factor and declined to follow the Washington court.[110] The criticism is probably well deserved; the main point of contention in cases such as these is whether further imprisonment will force the contemnor to comply. A balancing of the court's interest in having the recalcitrant party comply colors the civil contempt sentence with a punitive hue.[111]

Courts are free to take into consideration any number of factors. The trial court in Dr. Morgan's case took into account the possibility that Morgan's friends and supporters might desert her, the possibility that Morgan would realize the waste of her professional talents,[112] and the probability that she would miss her child.[113] Courts must make determinations on a case by case basis,[114] and the number of factors to be utilized in coming to a decision are limited only by the facts surrounding each case.

The question of who bears the burden of proof in a case such as Morgan's is an important question. Some courts fail to address the issue.[115] Most courts state that the burden is properly on the contemnor, but fail to state why.[116] The court in *King* reasoned that because the law presumes that one is capable of performing actions required by the court, the inability to comply is an affirmative defense.[117] The contemnor has both the burden of production as well as the burden of persuasion.[118]

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109. *Id.*

110. Morgan v. Foretich (Morgan IV), 564 A.2d 1, 5 n.2 (D.C. 1989).

111. The *Morgan IV* court recognized that the ultimate issue in child custody or visitation proceedings is the child's best interests. In contempt cases such as Morgan's, however, the overriding concern is the contemnor's due process rights. *Morgan IV*, 564 A.2d at 2.

112. Before being incarcerated, Morgan had a successful plastic surgery practice. She also authored four books, including one on her earlier custody battles. New York Times, May 21, 1989, § 6 (Magazine), at 28, col. 1. Morgan was also a contributing columnist for Cosmopolitan Magazine. Crook, *Elizabeth Morgan: A Mother Against the System*, COSMOPOLITAN, Oct. 1989, at 239.

113. *Morgan IV*, 564 A.2d at 4.

114. *See supra* note 100 and accompanying text.

115. *See In re* Crededio, 759 F. Supp. 589 (7th Cir. 1985); *In re* Dohrn, 560 F. Supp. 179 (S.D. N.Y. 1983).

116. *See* Simkin v. United States, 715 F.2d 34, 37 (2d Cir. 1983); *In re* Grand Jury Investigation (Braun), 600 F.2d 420, 425 (3d Cir. 1979); Lambert v. Montana, 545 F.2d 87, 91 (9th Cir. 1976).

117. King v. Department of Social & Health Serv., 110 Wash. 2d 793, 800, 756 P.2d 1303, 1310 (1988).

118. *Id.*

D. Standard of Review

The question of what standard of review a court should apply is an important one in civil contempt cases. Not all appellate courts have been careful to discuss the standards for reviewing lower court rulings on the effect of prolonged incarceration on civil contemnors; some fail to mention it at all.[119]

There are indications that the standard of review may differ among jurisdictions, depending on whether there is a legislatively mandated maximum period of incarceration for civil contemnors. Prior to the District of Columbia Civil Contempt Imprisonment Limitation Act of 1989, two states had placed caps on the amount of time a civil contemnor may be held in custody: Wisconsin has a maximum sentence of six months,[120] and California's limit is twelve months.[121] In addition, Congress has limited the civil contempt power regarding witnesses who refuse to cooperate with federal grand juries. In this context, federal law limits civil contempt sentences for witnesses refusing to testify to eighteen months or the life of the grand jury, whichever is shorter.[122] There are no reported cases from Wisconsin or California directly on point since the enactment of their statutes limiting civil contempt. Federal courts, however, have repeatedly asserted that the problem concerning standards of review is ameliorated by the presence of the federal statute.[123] These courts have reasoned that Congress, by setting a limit of eighteen months imprisonment, has attempted to resolve the problem of distinguishing between coercion and punishment. Federal courts have therefore adopted an abuse of discretion standard for periods shorter than eighteen months.[124] Courts are reluctant to draw "finer

119. Morgan v. Foretich (Morgan IV), 564 A.2d 1, 5 (D.C. 1989).

120. WIS. STAT. ANN. § 785.04 (West 1981).

121. CAL. PENAL CODE § 19(a) (Deering 1989). Three other states have set a maximum period of confinement for civil contempt, but only in limited circumstances. In West Virginia, a civil contempt sentence may not exceed six months in cases of divorce, annulment, and separate maintenance. W. VA. CODE § 48-2-22 (1989). New Jersey has set an eighteen month limit on civil contempt sentences for individuals who refuse to answer questions or produce evidence before the State Athletic Control Board. N.J. STAT. ANN. § 5:2A-10 (West 1985). In Pennsylvania, incarceration for civil contempt resulting from a failure to comply with an order concerning property settlement, or enforcing payment of arrearages in divorce cases, is limited to six months. 23 PA. CONS. STAT. ANN. §§ 401(k)(6), 503 (Purdon 1989).

122. 28 U.S.C. § 1826(a) (1982).

123. *See* Sanchez v. United States, 725 F.2d 29, 31 (2d Cir. 1984); Simkin v. United States, 715 F.2d 34, 37 (2d Cir. 1983)); *In re* Grand Jury Investigation (Braun), 600 F.2d 420, 425 (3d Cir. 1979).

124. *Sanchez*, 725 F.2d at 31; *Simkin*, 715 F.2d at 37; *Grand Jury Investigation (Braun)*, 600 F.2d at 425; *In re Parrish*, 785 F.2d 325, 328 (2d Cir. 1986).

lines than Congress has already drawn,"[125] and at least one appellate court has found lower court rulings to be "virtually unreviewable."[126] A court cannot, however, abdicate its responsibilities under the Constitution simply because the legislature has acted in a particular area,[127] and some courts seem willing to loosen the standard if "unusual circumstances" exist.[128] There is a general agreement, however, that the trial court has broad discretion in determining whether a civil contempt sanction has lost its coercive effect upon an individual at some point prior to the maximum time.[129]

There remains some confusion as to the applicable standard of review for courts that are not faced with a statutory ceiling on civil contempt. Without giving an explanation, at least one court has relied on the federal cases and adopted an abuse of discretion standard.[130] Although the opinion was vacated, the majority in *Morgan IV* was critical of the way courts have dealt with their standards of review, particularly when not confronted with a statutory maximum.[131] The *Morgan IV* court would not settle for a "virtually unreviewable" exercise of trial court discretion when the issue of due process was implicated.[132] The majority reasoned that broad trial court discretion implied the "right to be wrong without incurring reversal."[133] Therefore, under an abuse of discretion standard, a lower

125. *Grand Jury Investigation (Braun)*, 600 F.2d at 427.

126. *Simkin*, 715 F.2d at 38.

127. *See Grand Jury Investigation (Braun)*, 600 F.2d at 427.

128. *In re* Grand Jury Investigation (Braun), 600 F.2d 420, 427 (3d Cir. 1979). The court held, "We are reluctant to conclude, in the absence of unusual circumstances, that, as a matter cognizable under due process, confinement for civil contempt that has not yet reached the eighteen-month limit has nonetheless lost its coercive impact and become punitive." *Id.* An example of "unusual circumstances" would be one in which a business associate of the contemnor, who is in the same situation, finally gives in and testifies, but is immediately murdered or maimed. *Id.*

129. *In re* Crededio, 759 F.2d 589, 591 (7th Cir. 1985); Sanchez v. United States, 725 F.2d 29, 31 (2d Cir. 1984); Simkin v. United States, 715 F.2d 34, 37 (2d Cir. 1983); *In re* Dohrn, 560 F. Supp. 179, 189 (S.D. N.Y. 1983); *In re* Cueto, 443 F. Supp. 859, 864 (S.D. N.Y. 1978). In *Sanchez*, the lower court erroneously concluded that, [absent unusual circumstances] it "should not" make a finding that a civil contempt confinement has become punitive before the eighteen month period. The Court of Appeals remanded the matter because a court should be reluctant to conclude *as a matter of due process* that a civil contempt sanction has lost its coercive effect prior to the maximum period. The task of the trial court is different. The court held that even though Congress specified a maximum period of confinement for a particular contemnor, the issue of whether the confinement of that contemnor has ceased to be coercive before the maximum period "requires no showing of grounds for disagreeing with Congress, but only grounds for finding that no realistic possibility exists that the contemnor might yet testify if confinement is continued." *Sanchez*, 725 F.2d at 31.

130. King v. Department of Social & Health Serv., 110 Wash. 2d 793, 800, 756 P.2d 1303, 1310 (1988).

131. The decision in *Morgan IV* was reached before Congress acted.

132. Morgan v. Foretich (Morgan IV), 564 A.2d 1, 6 (D.C. 1989).

133. *Id.* (quoting Johnson v. United States, 398 A.2d 354, 367 (D.C. 1979)).

court's ruling does not have to be unquestionably correct to be upheld, it just cannot be "demonstrably incorrect."[134] The court concluded,

> Our review of an alleged violation of due process cannot tolerate a range of acceptable results, including one or more that may be "wrong." As to constitutional issues, therefore, we review for trial court error (with appropriate deference to the trial court's fact-finding role) with a view to "only one possible outcome."[135]

This rationale is especially persuasive for courts not confronted with a maximum period of time a person may be held in civil contempt. There is no reason, however, to refrain from applying this reasoning in jurisdictions with legislatively set maximum sentences. Appellate courts are not granted the power to hear witnesses testify so as to ascertain their veracity. Thus, reviewing courts should accord lower courts due deference on factual issues such as whether there is any substantial likelihood that the contemnor will comply. When due process concerns are raised, however, the courts should draw the line and make the appropriate decision. Legislatures are not given constitutional authority to define due process.

E. Periodic Hearings

Courts disagree on the issue of when, if ever, a lower court must grant motions for a hearing to determine if there is no substantial likelihood that continued confinement will accomplish its coercive purpose. Some courts have held that it is necessary for lower courts to grant periodic reviews to prevent a civil contempt sanction from becoming a life sentence.[136] Other courts have held that while an evidentiary hearing is often helpful, it is not an abuse of discretion for a trial court to decline to grant a hearing.[137] Without such an evidentiary hearing, it would be difficult if not impossible to ascertain whether there is the likelihood of compliance in the future. Courts should be more receptive to holding periodic hearings at the contemnor's request. Preferably, courts should be forced by legislative mandate to hold such hearings.[138]

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134. *Morgan IV*, 564 A.2d at 6.

135. *Id.* at 6-7 (quoting Wright v. United States, 508 A.2d 915, 920 (D.C. 1986)).

136. Simkin v. United States, 715 F.2d 34, 37 (2d Cir. 1983); King v. Department of Social & Health Serv., 110 Wash. 2d 793, 800, 756 P.2d 1303, 1310 (1988).

137. *In re* Grand Jury Investigation (Braun), 600 F.2d 420, 428 (3d Cir. 1979).

138. *See infra* note 219 and accompanying text.

IV. Congress to the Rescue

After the decision in *Morgan IV* was vacated for a rehearing en banc, the full Court of Appeals heard oral arguments on the fate of Dr. Morgan. The arguments were rendered moot, however, and a decision was never reached because Congress, in an extraordinary move, decided the fate of Dr. Morgan before the judicial process was completed. Under the District of Columbia Home Rule Act, the D.C. Council is prohibited from passing legislation concerning the district's court system.[139] District judges are appointed by the President and confirmed by the Senate. Congress is given sole power to amend the system. The District of Columbia Civil Contempt Imprisonment Limitation Act of 1989[140] [the Act] amended the District of Columbia Code sections concerning contempt.[141] The Act was whisked through Congress at a speed normally reserved for wartime or economic emergencies.[142]

Among other things, the Act limited to twelve months the amount of time an individual can be imprisoned on civil contempt charges arising out of a child custody proceeding.[143] The Act applied retroactively, thereby freeing Dr. Morgan. Congress's action was hailed by many organizations,[144] but the flurry of public support did not suppress the criticisms by some lonely dissenters.[145]

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139. D.C. CODE ANN. § 1-233(a)(4) (1981).
140. D.C. CODE ANN. § 11-741 (1981 & Supp. 1990).
141. D.C. CODE ANN. §§ 11-944, 11-721 (1981).
142. *See* Washington Post, Sept. 23, 1989, at A1, col. 1.
143. *See infra* note 180 and accompanying text.
144. Representative Frank Wolf (R-Va.) lists the following as groups supporting the act:
- National Network for Victims of Sexual Assault;
- Family Research Council;
- The National Organization for Women;
- Prison Fellowship;
- The Baltimore Sun;
- The Journal Newspapers.

CONG REC. H3244 (daily ed. June 27, 1989) (statement of Rep. Wolf).

145. In addition to criticism by District of Columbia judges, *see supra* note 25 and accompanying text, the Washington Post had "serious misgivings" about the new law. The Post editorial questioned the prudence of congressional wisdom of setting blanket statutory limits on the civil contempt power. Washington Post, Aug. 31, 1989, at A26 (editorial), col. 1. *See also infra* note 215 and accompanying text concerning statutory limits for civil contempt imprisonment.

The Post also shared the misgivings of the American Civil Liberties Union. The ACLU opposed outright statutory limits because they may send a " 'message that obedience to the court's order is not really required, but is simply an option to be balanced against the alternative option of one year of incarceration.' " Washington Post, Aug. 31, 1989, at A26 (editorial), col. 1. *See also infra* note 216 and accompanying text for further criticism of the Act by the ACLU.

Goldfarb, who has even suggested the abolition of civil contempt, *see* GOLDFARB, *supra*

Although Congressional action on behalf of Dr. Morgan drew wide public support, the implications of that action are disturbing both for policy reasons and for the changes it made in the substantive law of contempt. While Congress's action can be criticized in many respects, there is a silver lining in the cloud: the *Morgan* cases brought the problems of civil contempt to the attention of Congress as well as the public.

A. Impetus for Congressional Action

The impetus for Congress to act came from a strange and ironic set of alliances. It is not often, for example, that the National Organization for Women allies itself with conservative congressional leaders such as Representative Frank Wolf (R-Va.) and Senator Orrin Hatch (R-Utah).[146]

Although Morgan had been in jail since 1987, it was not until 1988 that the national media took an interest in the story. In March of that year, Alice Monroe, a speech pathologist who worked in the same hospital as Morgan, formed a group called "The Friends of Elizabeth Morgan" (FOEM).[147] FOEM began to hold candlelight vigils outside the detention center where Morgan was being held.[148]

About the same time, Charles Colson took notice of the case. A convicted felon who spent time in prison for obstruction of justice in the Watergate scandal, Colson is the founder of the Prison Fellowship Ministries, a Christian group that publishes a newsletter entitled "Jubilee."[149] Representative Frank Wolf, a friend of Colson's who is on the mailing list for "Jubilee," received a copy of the newsletter containing an article on the plight of Dr. Morgan.[150] Moved by the story, Wolf drafted a bill to free Dr. Morgan.[151] In the meantime, H. Ross Perot, a Texas billionaire, took notice of the *Morgan* case and began to call and write key senators.[152] Former

note 36, at 292, was also critical of the Act, but for different reasons. Goldfarb characterized the Morgan case as a "classic example of an instructive cliche: hard cases make bad law." Washington Post, Oct. 2, 1989, at A15, col. 1. Goldfarb argued that the new law did not go far enough. He believes that after six months, the coercive effect of imprisonment ceases, and the imprisoned individual should be prosecuted for "more serious criminal charges . . . [if] appropriate," with all the constitutional protections mandated in criminal cases. Washington Post, Oct. 2, 1989, at A15, col. 4.

146. *See* Washington Times, March 1, 1990, at F1, col. 1.
147. Washington Times, Oct. 17, 1989, at A5, col. 2.
148. *Id.*
149. Newsday, July 31, 1989, at 4, col. 1.
150. *Id.*
151. H.R. 2136, 101st Cong., 1st Sess. (1989).
152. Newsday, July 31, 1989, at 4, col. 1.

Democratic National Chairman Robert Strauss also played a important role in the Senate lobbying effort.[153] All this prompted Senator Orrin Hatch to sponsor the Senate version of the House Bill.[154]

B. Key Provisions of the Act

The House Committee on the District of Columbia stated in its Report that the purpose of the Bill was to amend the District of Columbia Code regarding contempt.[155] The Report also stated that although the amendments would affect Morgan's incarceration, it was not intended to provide a per se legislative remedy for her.[156] Instead, the Report declared that the Act was modeled after the California and Wisconsin statutes limiting civil contempt.[157]

As originally drafted, Wolf's Bill sought to limit to eighteen months the time a person can be imprisoned for civil contempt cases arising out of child custody disputes in the District's courts.[158] At subcommittee mark-up, however, an amendment was passed reducing the maximum time limit to twelve months. The amendment also made the Bill applicable to all cases of civil contempt rather than just child custody cases.[159]

The final version of the House Bill as reported out by the Committee contained some important exceptions to the twelve month limit. The Bill did not affect the time an individual can be sentenced for criminal contempt. Presumably, Morgan can still be prosecuted for criminal contempt or for other charges if she returns to the United States.[160] An exception to the twelve month limit applied when a trial was pending on criminal contempt charges.[161] A civil contemnor involved in a pending criminal contempt trial could have been imprisoned until the completion of the trial. In no case, however, could the contemnor have been imprisoned longer than eighteen months for the civil contempt charge.[162] An individual already imprisoned for civil contempt could be prosecuted for criminal contempt before the end of the twelve month period, but no earlier than

153. *Id.*
154. S. 1163, 101st Cong., 1st Sess. (1989).
155. H.R. REP. No. 98, 101st Cong., 1st Sess. 3 (1989).
156. *Id. See also infra* note 188 and accompanying text.
157. *See supra* notes 120-21 and accompanying text.
158. H.R. REP. No. 98, 101st Cong., 1st Sess. 3 (1989).
159. *Id.*
160. *See infra* note 13 and accompanying text.
161. H.R. 2136, 101st Cong., 1st Sess., 135 CONG. REC. H3240-41 (1989).
162. *Id.*

six months after being incarcerated.[163] The Bill also provided that any individual already imprisoned for civil contempt on the date of enactment could be prosecuted for criminal contempt at any time during the ninety-day period beginning on the date of enactment.

The House Bill also mandated that any criminal contempt trial in a situation such as Dr. Morgan's had to begin within ninety days of the charge being instituted.[164] The court had to allow a trial by jury if the individual requests. There was no requirement that a sentence be longer than six months for the defendant to obtain a jury trial.[165] Hence, the defendant would be afforded a jury trial, even if the judge had a one week sentence in mind. Furthermore, the criminal contempt trial could not be before the same judge that originally imprisoned the individual for civil contempt.[166] This was a prudent provision, aimed at avoiding any bias on the part of the judge who has been repeatedly rebutted by that contemnor in the past.

Some Committee members were concerned that because the Bill did not expressly provide for retroactivity, Dr. Morgan could not be released by it.[167] The Committee Report, however, clearly stated that there was a consensus among the members that the bill had a retroactive effect and would free Dr. Morgan.[168]

The Committee on the District of Columbia subsequently reported the Bill out for the full House to debate and vote on it. On June 28, 1989, the House approved the Bill by a vote of 376 to 34, with 22 members not voting.[169]

The Senate's version of the Bill had a number of significant differences. First, the Senate's version did not have as broad a scope as the House version. The Senate adopted Senator Hatch's strongly expressed preference that the Bill be limited to only child custody proceedings, and not apply to all civil contemnors.[170] The Senate's version also contained an expedited appeal procedure.[171] According to this procedure, the District of Columbia Court of Appeals had to hear an appeal from an order of the Superior Court holding an indi-

163. *Id.*
164. *Id.*
165. *See supra* note 46 and accompanying text.
166. H.R. 2136, 101st Cong., 1st Sess., 135 CONG. REC. H3240-41 (1981).
167. H.R. REP. NO. 98, 101st Cong., 1st Sess., 3-4 (1989).
168. *Id.*
169. 135 CONG. REC. H3262 (daily ed. June 28, 1989).
170. 135 CONG. REC. S10810 (daily ed. Sept. 7, 1989). Senator Sasser, a proponent of the Bill professed that although issues of due process and dissipation of coercive power are present in any case in which a civil contemnor steadfastly refuses to comply, Congress "need not legislate with an eye to every hypothetical case." *Id.*
171. S. 1163, 101st Cong., 1st Sess. 135 CONG. REC. S10809 (1989).

vidual in contempt in a custody case no later than sixty days after a contemnor requests an appeal.[172] The Bill also contained an explicit provision making it retroactive to January 1, 1987.[173]

Because of the speed and manner with which the Bill was brought to the Senate floor, some Senators expressed concern that not enough attention was devoted to the subject.[174] During the debates, Senator Mitchell sponsored an amendment to the Bill containing two important changes. Mitchell first suggested to "sunset" the Bill after eighteen months; this meant that the bill would be rendered ineffective eighteen months after enactment.[175] Mitchell's amendment also mandated the Senate Governmental Affairs Committee and the Judiciary Committee to conduct a study on the law of civil contempt in the District of Columbia and in the federal courts and to make recommendations to the Senate by September 1, 1990.[176] That same day, the Bill, which included Senator Mitchell's amendment, was unanimously approved.

An interesting question arose during Congressional debates on both versions of the Bill: after Morgan's release, could she be hailed into court the next day, asked once again to disclose the location of the child, and then be sent back to prison for twelve months if she refused to obey? Representative Durban played the Devil's advocate:

> If I represented [Foretich] I would file a petition in the District of Columbia the next day, asking [Morgan] to disclose again where that child is, and if she fails to do so, she may find herself back in the cell again for another twelve months.[177]

Neither Bill, nor the final Act, explicitly stated that such an action was precluded. The Senate Committee on Governmental Affairs, however, recognized the loophole in its Report and suggested that if the substance of the order giving rise to civil contempt remained unchanged, repeated imprisonments of an individual for successive twelve month periods was prohibited.[178]

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172. *Id.*

173. *Id.*

174. *See* 135 CONG. REC. S10811 (daily ed. Sept. 7, 1989) (statement of Sen. Levin). Professor Doug Rendleman who testified before a House Subcommittee Hearing noted that "[s]ome of the witnesses at the hearing and members of Congress didn't understand what the hell was going on." He tempered his statement by saying, "That is no reflection on them. The law is extremely technical and hard to sort out." The National Law Journal, Oct. 30, 1989, at 42, col. 2.

175. 135 CONG. REC. S10811 (daily ed. Sept. 7, 1989) (statement of Sen. Levin).

176. *Id.*

177. 135 CONG. REC. H3248 (daily ed. June 27, 1989) (statement of Rep. Durban).

178. S. REP. NO. 104, 101st Cong., 1st Sess. 8 (1989). Although there was nothing explicit in the final Act on this point, courts usually place great weight on Committee Reports

The District of Columbia Civil Contempt Imprisonment Limitation Act of 1989 was signed into law on September 23, 1989. The Act contained the Senate provision that it would only affect civil contemnors in cases arising out of custody disputes.[179] Also, under the Act, the contemnor could be imprisoned for a maximum of twelve months on a civil contempt charge unless criminal contempt charges were brought between the sixth and twelfth month. In no instance, however, could the contemnor be incarcerated for more than eighteen months.[180]

The Act incorporated the exact provisions of both the House and Senate Bills regarding criminal contempt: the limits did not apply to criminal contemnors; the criminal contempt trial had to begin within ninety days of the charge; trial was to be before a jury if requested; and the trial could not be by the same judge who imprisoned the individual for civil contempt.[181]

The Act also retained the Senate Bill's provisions that any appeals taken must be heard no later than sixty days after an appeal is requested,[182] and the law was to "sunset" after eighteen months.[183] In addition, the Senate Committee on Governmental Affairs, together with the House Committee on the District of Columbia were required to conduct a study on the law of civil contempt.[184] The Sen-

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when interpreting legislation. F. CUMMINGS, CAPITOL HILL MANUAL 53 (1976). *See, e.g.* Garcia v. United States, 469 U.S. 70, 76 (1984) ("[T]he authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill, which 'represen[t] the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation.' ") (quoting Zuber v. Allen, 396 U.S. 168, 186 (1969)).

179. D.C. CODE ANN. § 11-741 (1981 & Supp. 1990).

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.* The law, therefore, was rendered ineffective on March 23, 1991.

184. After reviewing the law of civil contempt in the District of Columbia, the Senate Governmental Affairs Committee and the House Committee on the District of Columbia concluded:

> The Committee has found no evidence that there is an on-going problem with incarceration for civil contempt generally in the District of Columbia. There is no evidence that judges are abusing their power to confine contemnors, and the average sentence served by civil contemnors who are confined is only 12 days. Thus, there appears to be no justification for expanding the Act's coverage.

SENATE GOVERNMENTAL AFFAIRS COMM. TOGETHER WITH THE HOUSE COMM. ON THE DISTRICT OF COLUMBIA, CIVIL CONTEMPT IN THE DISTRICT OF COLUMBIA COURT, S. DOC. NO. 554, 101st Cong., 2d Sess. 8 (1990).

The Committees did, however, recognize the potential for some civil contemnors to be significantly deprived of liberty without the full range of procedural safeguards that apply in criminal cases. The Committees, therefore, recommended the following:

> (1) expedited appeals for individuals held in civil contempt in all types of cases (not just child custody cases); (2) plenary review on appeal of civil contempt cases; (3) appointed counsel for indigents at civil contempt hearings; and (4) periodic review of sanctions for civil contempt by the court that imposed them to

ate Committee on the judiciary was also required to submit a report on civil contempt in the federal courts.[185]

C. *Critique of the Act*

While the impetus for Congress to intervene was a result of the good intentions of influential citizens and politicians, Congressional interference in this emotional affair set a dangerous precedent and was a matter of bad policy. The Act did nothing to help the plight of an innocent child deprived of both parents, as many members of Congress stressed it would.[186] In addition, it opened up the Senate to a charge of hypocrisy.[187]

It cannot be said that this law was anything but a private relief bill to free Dr. Morgan. Her case was the impetus for action, and the Act was so narrowly tailored that it was inconceivable that it would affect anyone but her. Senator Hatch claimed that, "[w]hile the specific need for this bill is illustrated by the plight of Dr. Elizabeth Morgan, and while the bill would free her, it is emphatically not for her benefit alone. This is not a private bill, but a bill of general application."[188] If this is so, why did it apply only to child custody cases? Why was it retroactive? And why did it contain a sunset provision?

No Constitutional prohibition exists against passing private legislation so long as it is not classified as a bill of attainder.[189] In the context of this case, however, the private law set a bad precedent and ultimately damaged the integrity of Congress. In Congress, legislation is usually passed as a matter of general policy, for masses of people, not for a determined mother banished to the jail cells of a detention center. Once it is done in this case, could the members of Congress resist taking on the task of intervening in other sympathetic cases that are pleaded before them? Some members think not; instead, they feel they are on the verge of the proverbial "slippery

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ensure that they are still appropriate.

Id. at 10.

185. The Senate Judiciary Committee concluded that in the federal courts, no problems with civil contempt exist, and that any change in current federal law is unnecessary. SENATE JUDICIARY COMMITTEE REPORT ON CIVIL CONTEMPT IN FEDERAL COURTS, S. DOC. NO. 432, 101st Cong., 2d Sess. 2 (1990).

186. *See infra* note 208 and accompanying text.

187. *See infra* notes 205-207 and accompanying text.

188. 135 CONG. REC. S10811 (daily ed. Sept. 7, 1989) (statement of Sen. Hatch). *See also* 135 CONG. REC. S10814 (daily ed. Sept. 7, 1989) ("I would not want this to pass with somebody thinking this is a private relief bill. It is not anything of the kind. It is a bill of general application . . . .") (statement of Sen. Armstrong).

189. *See* United States v. Brown, 381 U.S. 437, 473 (1964) (White, J., dissenting).

slope."[190]

Even if Congress were to act in this manner from time to time, it would assuredly benefit only the affluent and powerful. It is doubtful that Congress would have come to the rescue of an indigent woman from the ghetto. The case of *Baltimore City Department of Social Services v. Bouknight*[191] provides a good example. In *Bouknight*, Jacqueline Bouknight was suspected of physically abusing her infant child.[192] The Baltimore City Department of Social Services was notified and secured a court order to remove the child from Bouknight's control.[193] Despite Bouknight's history of drug abuse, the order was later modified to return the child to Bouknight's custody.[194] Because Bouknight would not cooperate, the Department of Social Services petitioned the court again to remove the child from the home.[195] Bouknight had given conflicting reports to the Department concerning the child's location and the Department feared the child was missing and perhaps dead.[196] When Bouknight declined to produce the child, she was found in contempt and was imprisoned.[197] The underlying concern of the case was that the child may be dead, and that Bouknight was responsible.

Bouknight attempted to quash the contempt order on fifth amendment grounds, claiming that revealing the location of the child might tend to incriminate her.[198] The trial court rejected her argument but the Maryland Court of Appeals reversed, holding that the public's right to protect children does not outweigh a mother's constitutional right against self-incrimination.[199] The United States Supreme Court heard an emergency appeal and ordered Bouknight's incarceration for civil contempt to continue until it heard arguments on the case.[200] After full consideration of the case, the Supreme Court reversed the Maryland Court of Appeals decision.[201]

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190. One Senator put it this way: "After passing this law, will we be able to say no to someone else who comes along and has an equally compelling case? I doubt it." 135 CONG. REC. S10816 (daily ed. Sept. 7, 1989) (statement of Sen. Danforth).

191. Baltimore City Dep't. of Social Serv. v. Bouknight, 110 S.Ct. 900 (1990).

192. *Id.* at 903. Bouknight's child was hospitalized with a fractured leg. In the hospital, Bouknight was observed shaking the child, dropping him in his crib, "and otherwise handling him in a manner inconsistent with his recovery and continued health." *Id.*

193. *Id.*

194. *Id.*

195. *Id.*

196. Baltimore City Dep't of Social Serv. v. Bouknight, 110 S. Ct. 900 (1990).

197. *Id.*

198. *Id.*

199. *In re* Maurice M., 314 Md. 391, 401, 550 A.2d 1135, 1144-45 (1988).

200. Baltimore City Dep't of Social Serv. v. Bouknight, 109 S.Ct. 571 (1988).

201. Baltimore City Dep't of Social Serv. v. Bouknight, 110 S. Ct. 900 (1990). The

Bouknight's imprisonment began in April, 1988, and she is still in jail at this date. If Bouknight's actions took place only thirty miles south of where they did, it is unlikely that there would have been such a clamor in Congress to expedite a new law to limit civil contempt. Not only would Congress not have acted on a less sympathetic case such as Bouknight's, but that case should be looked upon as one of the pitfalls of placing an outright cap on imprisonment for civil contempt.[202]

Congress's actions infuriated many District of Columbia judges who fiercly (but anonymously) criticized the Act.[203] Such criticism is justified in light of the fact that Congress interfered with an on-going case before the Court of Appeals. In effect, Congress overruled the courts and freed Morgan before her judicial remedies were exhausted. As one Senator put it, "it is inconsistent with the Senate's proper legislative role for it to become a court of appeal for disappointed litigants, whether in the Morgan case or any other."[204] Congressional action in this case was not only damaging to Congress's relationship with the judiciary but it also tends to politicize the judicial system. It is simply not sound policy for a legislative body to intrude in an on-going judicial case.

In passing a law to limit civil contempt in the District of Columbia, the Senate opened itself up to a charge of hypocrisy. Under current law, the Senate has the power to cite individuals for civil contempt if they refuse to testify at hearings.[205] This power is not tempered by a limit on the amount of time a person can be incarcerated. As Senator Mitchell pointed out, the Senate is currently holding William Borders in contempt for refusing to testify in the im-

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Court held that "Bouknight may not invoke the [fifth amendment] privilege to resist the production order because she has assumed custodial duties related to production [of the child] and because production is required as part of a noncriminal regulatory regime." *Id.* at 905.

The court in *Morgan IV* held that the issue involved in *Bouknight* was inapposite to Morgan's case because Morgan had not asserted a fifth amendment privilege against self-incrimination as a reason for not complying with the court order. Also, Bouknight challenged her *initial* incarceration for civil contempt, a distinctly different issue. Morgan v. Foretich (Morgan IV), 564 A.2d 1, 36 (D.C. 1989).

202. *See infra* note 216 and accompanying text.

203. *See supra* note 25 and accompanying text.

204. 135 CONG. REC. S10815 (daily ed. Sept. 7, 1989) (statement of Sen. Danforth). Senator Mitchell stated that

> [d]ifficult as this case may be, unfair as the result may seem, it is extremely unwise for the Congress to interfere in this way with the judicial branch of government, especially with a bill to affect a specific case now pending in the courts and right in the middle of litigation.

135 CONG. REC. S10818 (daily ed. Sept. 7, 1989) (statement of Sen. Mitchell).

205. 28 U.S.C. § 1365 (1982 & Supp. I 1987).

peachment trial of Judge Alcee Hastings.[206] And in 1981, William Cammissano was held in contempt for nearly eighteen months for refusing to testify before the Senate Subcommittee on Investigations.[207] The Senate has subjected the District's judges to a limitation on enforcing their orders while Senator's retain the prerogative to hold civil contemnors well beyond the twelve month maximum imposed on the District of Columbia courts.

Perhaps one of the biggest fallacies during Congress's debates was the widespread belief of the members that passage of the Act would actually assist in bringing Morgan's child home from "extradition."[208] Senator Hatch stated that "[t]he important thing to remember is that the child is deprived of both parents . . . Hilary is left without a parent. I think it is time for us to do something about it."[209] The Senator's rhetoric is appealing but unfortunately meritless.[210] The Act simply addressed the amount of time a civil contemnor can remain imprisoned, it did not affect the underlying court order compelling Morgan to produce the child. Issues of civil contempt and the contemnor's due process rights are important and are in need of legislative overhaul.[211] The only viable solution to solving the problem of parents secreting their children in these situations is to attack the problem at its root. Legislatures need to address the problems of proving sexual abuse charges in the courts, or provide an alternative avenue to the use of civil contempt in cases of child custody battles.[212] The District of Columbia's Act simply did not address these problems.

Aside from being a private bill for the benefit of Dr. Morgan, the Act raised another important issue: to what extent should the legislature limit the ability of the judiciary to enforce its valid de-

206. 135 CONG. REC. S10818 (daily ed. Sept. 7, 1989) (statement of Sen. Mitchell).

207. *Id.*

208. Morgan referred to Hilary's absence as Hilary's being in a "foster home of her choice." Washington Post, Sept. 27, 1989, at D4, col. 1.

209. 135 CONG. REC. S10819 (daily ed. Sept. 7, 1989) (statement of Sen. Hatch). Senator Hatch, in defending the reason why his Bill only applies to child custody cases reasoned, "we single out custody because the helpless child is the real loser in such cases, deprived indefinitely of both parents. The case for limiting the court's summary contempt power is strongest here." 135 CONG. REC. S10811 (daily ed. Sept. 7, 1989) (statement of Sen. Hatch). This logic is rather specious when one considers the fact that passage of the Act did nothing to change the underlying court order.

210. It seems that the Senator's statement is rhetoric only. When Foretich's lawyer, Elaine Mittleman, asked about finding Hilary, Hatch replied, "That's not something you can expect the Congress of the United States to do." Newsday, Sept. 7, 1989, at 8, col. 1.

211. *See infra* § V.

212. *See* Apel, *Custodial Parents, Child Sexual Abuse, and the Legal System: Beyond Contempt*, 38 AM. U. L. REV. 491 (1989) (suggesting that a necessity defense to contempt should be available to civil contemnors).

crees? Senator Hatch stated, "My bill simply recognizes that after one year, continued imprisonment of a protective parent constitutes punishment, not persuasion."[213] The court system may be slow to determine when coercion ends and punishment begins, but some serious implications result from imposing a maximum cap on civil contempt sentences.

Judge Maxwell Davison of the Lehigh County Common Pleas Court in Allentown, Pennsylvania noted that situations such as Morgan's are rare and only arise when there is an extreme set of circumstances.[214] Placing an outright cap on civil contempt sentences creates a light at the end of the tunnel for the unhappy litigant who refuses to comply with a court order. A cap would not only benefit contemnors such as Morgan when no amount of coercion will force compliance, but it would also benefit others who would essentially be given a choice between complying with a court order or spending a predetermined time in jail. The thought of an indeterminate stay behind bars is often a strong factor in persuading unhappy litigants to comply. Senator Danforth noted that "[i]t is the very indeterminacy of imprisonment that enables the court to achieve the behavior it seeks. Eliminate the indeterminacy, and the incentive to comply is weakened."[215] Establishing an outright maximum presents civil contemnors with a choice when none existed before. The contemnor can either comply with the order or remain imprisoned for a specified period of time. Granted, the thought of spending time behind bars is not a happy one for most, but establishing a maximum sentence would benefit the adamant or vindictive party.

To the surprise of some, the American Civil Liberties Union was publicly opposed to passage of the Act. The ACLU reasoned that the civil contempt power is a powerful tool in a judge's arsenal to protect the rights of political and racial minorities, and that placing limits on that power would hurt the cause of civil liberties.[216] To the delight of many, passage of the Act represented a victory for those who viewed Morgan's case as sympathetic and unjust, but the potential dangers should also be considered. The *Bouknight* case is an example. Had Bouknight benefited from this type of legislation, she would have been released and the State would have minimal evidence to produce in a criminal case against her. The problem would

213. 135 CONG. REC. S10812 (daily ed. Sept. 7, 1989) (statement of Sen. Hatch).
214. The National Law Journal, Oct. 30, 1989, at 42, col. 3.
215. 135 CONG. REC. S10816 (daily ed. Sept. 7, 1989) (statement of Sen. Danforth).
216. As an alternative, the ACLU proposes an "expeditious and searching" review by appellate courts. Legal Times, Sept. 7, 1989, at 3. *See also supra* note 145.

also apply to fathers who refuse to pay child support. The father would simply have a choice of either spending a predetermined amount of time in jail or paying substantial support for the next eighteen years.

V. Recommendations

The convoluted and complex law of civil contempt is in dire need of legislative overhaul. The courts and legislatures face the problem of striking an appropriate balance. Ensuring the due process rights of those held in civil contempt must be balanced against ensuring the rights of the party hoping to reap the benefits of a court order. These interests must also be balanced against judges' interest in having effective means to enforce their orders. The judicial process is too slow and the test for determining when a contemnor can no longer be coerced is difficult to apply. On the other hand, a legislative cap on civil contempt sentences is an over-encompassing solution fraught with numerous pitfalls.

A compromise solution would keep the judicial branch supreme in deciding when a civil contemnor must be released, but it should be improved through legislative mandate. Instead of placing an outright cap on civil contempt sentences, the rights of all interested parties would be better served if there was a statutory *presumption* that after six or twelve months, further incarceration will not gain compliance. In other words, after a certain amount of time, there would exist a presumption that the coercive impact of civil contempt has ceased and that the imprisonment has become a punishment. An individual contemplating compliance with a court order would no longer have an established maximum sentence to balance against complying. Faced with an indeterminable jail sentence, the contemnor would be more likely to comply with the court order.

Once the statutory presumption is reached, the burden of persuasion should shift to the party who would benefit from compliance. The initial burden of production should remain with the contemnor. At this point, the rationale of *King v. Department of Social & Health Services* is no longer valid. The law no longer presumes that a party will perform actions required by the court;[217] therefore, the burden of persuading the court that there *is* a substantial likelihood of compliance should be on the opposing party.

In drafting civil contempt laws, legislators should consider im-

217. *See supra* notes 117-18 and accompanying text.

posing on judges a duty to allow periodic reviews of the status of the civil contemnor.[218] If requested, contemnors should be granted full evidentiary hearings at perhaps three month intervals. Before the end of the statutory presumption period, the contemnor should carry the burden of proving that further imprisonment will not force compliance. As noted above, once the presumption arises that further imprisonment is punitive, the burden should shift to the opposing party. Full evidentiary hearings at regular intervals would give the contemnor a chance to present his or her story as well as provide assurances that the contemnor would not be imprisoned indefinitely.[219]

At least two provisions of the District of Columbia Civil Contempt Imprisonment Limitation Act were insightful and should be incorporated into future legislation. The trial of an individual prosecuted for criminal contempt should be heard before a different judge than the one who imprisoned the contemnor for civil contempt.[220] In the same respect, when a contemnor requests a hearing to determine if compliance can be gained by further incarceration, that hearing should not be held by the same judge who imposed the underlying order. This requirement would prevent a judge's personal pride from becoming an obstacle to the resolution of an issue that is separated from the issue of the underlying order. Judges understandably have a great interest, both on a personal level and a professional level, in seeing their orders obeyed.

Similarly, the mandatory sixty-day appeal provision was a positive aspect of the Act.[221] Once the presumptive period has commenced, appellate courts should be required to hear arguments within sixty days on appeals taken from a denial of the civil contemnor's motion to be released. Although appellate courts should give due deference to the factual findings of the trial court, they should approach the constitutional issue of due process with a view to "only one possible outcome."[222] Therefore, the reviewing court should review de novo a lower court's ultimate conclusion.[223]

Finally, these reforms should apply to *all* civil contempt actions,

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218. *See supra* note 136-37 and accompanying text.

219. At the very least, the court should be required to hold a hearing at the end of the six or twelve month period that gives rise to a presumption of punishment.

220. D.C. CODE ANN. § 11-741 (1981 & Supp. 1990).

221. *Id.*

222. *See supra* note 135 and accompanying text.

223. *See* United States v. Castillo, 844 F.2d 1379, 1386 (9th Cir. 1988) (appellate court should review de novo the ultimate conclusion on the constitutional issue of the validity of a warrantless search).

not only those that arise out of a custody battle. There is no legal justification for applying a limit or presumption to only custody cases. As Senator Rudman remarked, "it makes no legal sense to assert that judges presiding in custody cases should have less power to enforce their orders than judges in all other cases . . . ."[224] As mentioned earlier,[225] tackling the problems of child sexual abuse and parents hiding their children should be more proximately related to the root of the problem. Limiting the scope of civil contempt in such cases does nothing to solve that underlying problem.

VI. Conclusion

Dr. Elizabeth Morgan's predicament exemplifies the need for reform in the area of civil contempt. The courts have historically had difficulty differentiating between civil and criminal contempt. And for civil contemnors imprisoned for extremely long periods of time, the wheels of justice grind slowly. It is a lengthy, complicated process for the courts to determine whether further imprisonment will force compliance with the court's underlying order.

The adage that "hard cases make bad law" is an apt one in this case. The law of civil contempt is in need of legislative reform, preferably without the pressure of a "hard" case. Although the *Morgan* case and the resulting congressional reaction to it have produced controversy, that controversy may be the impetus needed to push through meaningful reform. Representative Wolf said, "If the sole result of my bill is that [i]t sparks discussion which produces another responsible solution to the controversy, I will have considered my effort a success."[226] In this sense, it was indeed a success.

Randal S. White

224. The National Law Journal, Oct. 30, 1989, at 42, col. 2.
225. *See supra* note 212 and accompanying text.
226. 135 CONG. REC. H3244 (daily ed. June 27, 1989) (statement of Rep. Wolf).